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No. 83-912 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD LUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a preliminary ruling by the district court, denying petitioner's motion to limit the government's ability to cross-examine him about a prior conviction, was reviewable on appeal after petitioner declined to testify at trial.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 713 F.2d 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. A petition for rehearing was denied on October 3, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed on December 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy and possession with intent to distribute cocaine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to concurrent terms of four years' imprisonment,

to be followed by a three-year special parole term, and fined $3000 on each count. The court of appeals affirmed. Pet. App. 1a-13a.[1]

1. The evidence at trial, the sufficiency of which is not in dispute, established that James Luigs, Robert Kolofer, and petitioner conspired to sell cocaine to Dallas Luigs on October 1, 1981. Dallas Luigs had been arrested by local police officers several days before for possession of two and a half ounces of cocaine that he had bought from his cousin, co-defendant James Luigs (Tr. 67). He agreed to cooperate to avoid prosecution (Tr. 41-42, 126-127). Accordingly, he telephoned his cousin (Tr. 43) to arrange the purchase of more cocaine (Tr. 67).

James Luigs, a business associate of petitioner's (Tr. 44), flew from Chicago to Memphis on October 1 to consummate the sale. As they had done before, the two cousins drove to a Holiday Inn parking lot (Tr. 68-69).[2] James Luigs then went into the hotel, returned with Kolofer (Tr. 69), and opened the trunk of a Mercury parked in the lot. In the trunk was an attache case. James Luigs opened the case and took out a brown paper bag; inside the bag was another plastic bag, and in that were several smaller bags containing

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[1]Petitioner was acquitted on one count of possession with intent to distribute cocaine. Co-defendant James Luigs was also convicted on one count each of conspiracy and possession. Co-defendant Robert Kolofer was convicted on one count of possession. The court of appeals also affirmed their convictions.

[2]Dallas Luigs had been introduced to petitioner in the summer of 1981 (Tr. 44) and had twice purchased cocaine from him (Tr. 46-49). On one occasion petitioner sold cocaine to Dallas Luigs from a warehouse in Chicago (Tr. 46). On the second occasion petitioner flew to Memphis and distributed cocaine out of the trunk of an automobile parked at the Holiday Inn (Tr. 48-49). James Luigs also flew to Memphis twice and sold Dallas cocaine from the trunk of a car parked at the Holiday Inn (Tr. 50-53).

cocaine. Tr. 70, 207-208. Memphis police officers watching the parking lot then arrested James Luigs and Kolofer (Tr. 70, 133-134, 153-157). Petitioner's fingerprints were found on the larger cocaine-filled plastic bag (Tr. 227, 245, 262-263).[3] The Mercury was also circumstantially tied to petitioner: in 1980 petitioner had gone to an automobile dealership in a Chicago suburb and ordered the car. When the car was delivered, however, it was registered in the name of Richard R. Clark (Tr. 187-189). Police investigation revealed that no such person lived at the address given. No current driver's license was issued to a Richard R. Clark, and agents were unable to locate any such individual. Tr. 363-366.

In December 1981, DEA agents obtained a warrant for petitioner's arrest on the charges involved in this case. When they went to his office to execute it petitioner was not there; the agents left word for him to call them. Tr. 361-363. About an hour and a half later police officers saw petitioner entering a car parked behind the office. They approached him, identifying themselves, and petitioner sped away. After a high speed chase, converging police cars were able to stop petitioner and effect the arrest. Tr. 374-377.

2. At trial petitioner filed a motion in limine to restrict the government from using a 1974 conviction to impeach him if he chose to testify. Petitioner's primary objection was that he had been discharged under state law (see Ill. Ann. Stat. ch. 56½, § 710 (Smith-Hurd Cum. Supp. 1983-1984)), or that the prior conviction—allegedly for possession of

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[3]As part of its direct case the government introduced a card bearing petitioner's fingerprints, taken in December 1978 (Tr. 245; GX 13). Petitioner requested an instruction that the prints were not taken in connection with a criminal matter (Tr. 248), even though they had been taken when petitioner was picked up for a probation violation (Tr. 337). The court instructed the jury that it was not to draw any inference from the fact that petitioner's fingerprints had been taken previously (Tr. 250-251).

marijuana—had been expunged (Tr. 336). During prolonged conferences on the matter the government responded that it had no evidence of petitioner's discharge or expungement. State records did show that he had been arrested in 1978 for a probation violation relating to that conviction (Tr. 337-356). Petitioner did not rebut the government's contention and introduced no evidence of discharge or expungement.

Petitioner then argued that the probative value of his prior conviction for possession of marijuana was outweighed by its prejudicial effect, and that it should accordingly be excluded under Fed. R. Evid. 609(a)(1).[4] The court agreed that marijuana possession was not sufficiently probative of petitioner's honesty for such a conviction to be admissible (Tr. 350, 353-354). However, the government represented that petitioner had been convicted for possession of a controlled substance under an Illinois statute that did not include marijuana (Tr. 356-357; Ill. Ann. Stat. ch. 56½, § 1402 (Smith-Hurd Cum. Supp. 1983-1984)). When petitioner was unable to rebut the government's claim, the district court ruled that a conviction for a controlled substance other than marijuana was a "crime involving moral turpitude" that fell within the category of permissible impeachment evidence. Accordingly, it declined to exclude the prior conviction (Tr. 423-425). The court also noted that

[4]Rule 609(a) provides:

> **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

"if [petitioner] goes * * * into other elements, I don't know anything about drugs, I have never had any dealing with drugs * * * then the door is open to go into the matter of credibility as it relates to the defendant in respect of a prior conviction or a prior offense" (Tr. 426). The court ruled, however, that petitioner could give limited testimony explaining his flight to avoid arrest without being impeached by his prior conviction (Tr. 425-426). Petitioner chose not to testify at trial.

3. On appeal, petitioner contended that the district court abused its discretion in denying the motion in limine without making a specific finding that the probative value of the prior conviction outweighed its prejudicial effect. The court of appeals declined to reach the issue because petitioner had not testified at trial, and his prior convictions accordingly were not offered into evidence against him. Pet. App. 2a-12a.

The court advanced a number of reasons why a defendant who chooses not to testify should not be permitted to challenge the court's ruling in limine on appeal. First, an advisory ruling on a motion in limine is by definition preliminary, subject to change by the trial court "for whatever reason, when the evidence is actually offered and objected to at trial" (Pet. App. 6a (footnote omitted)). Second, because the trial court has discretion not to rule on motions in limine, overturning convictions on the basis of such rulings will ultimately discourage the practice of giving advisory rulings (*ibid.*). Third, a reviewing court in a case such as this would lack the "concrete factual basis [that] is required for appellate review of the merits of the evidence's admissibility" (Pet. App. 8a). Indeed, here there was not even any indication that petitioner "was actually precluded from testifying by fear of impeachment or whether his testimony would have significantly aided his defense" (Pet. App. 8a). Finally, allowing appeal here would make it

impossible for the reviewing court to decide whether the district court's error was harmless, since the court of appeals would have before it neither the defendant's proposed testimony nor the details of the government's cross-examination (Pet. App. 7a-8a).

DISCUSSION

This case presents a recurring and important question of criminal procedure that has divided the courts of appeals—whether a defendant may appeal the denial of his motion in limine to restrict the government's impeachment of his testimony when the defendant has thereafter declined to testify at trial. Because of the importance of the issue and the inter-circuit conflict, we do not oppose granting the petition for a writ of certiorari.

1. The court of appeals in this case held that a defendant who chooses not to testify may not seek review of the district court's preliminary ruling that the government may impeach him on cross-examination by introducing evidence of a prior conviction.[5] The Seventh Circuit has held that review is not available if the district court explicitly reserves the right to change its ruling on admissibility.[6] The Ninth Circuit has held that review is available, but only if the defendant has announced an unequivocal intention to testify if his motion is granted and outlined the substance of

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[5]The Ninth Cicuit until recently took the same position. See *United States* v. *Fulton*, 549 F.2d 1325, 1327 (1977); *United States* v. *Murray*, 492 F.2d 178, 197 (1973), cert. denied, 419 U.S. 942 (1974); *United States* v. *Walters*, 477 F.2d 386, 389, cert. denied, 414 U.S. 1007 (1973). The current Ninth Circuit rule was announced in *United States* v. *Cook*, 608 F.2d 1175 (1979) (en banc), cert. denied, 444 U.S. 1034 (1980).

[6]*United States* v. *Banks*, 687 F.2d 967, 970-972 (7th Cir. 1982), cert. denied, No. 82-5753 (Feb. 22, 1983); *United States* v. *Sternback*, 402 F.2d 353 (7th Cir. 1968), cert. denied, 393 U.S. 1082 (1969).

his likely testimony.[7] The First, Fourth, Fifth, Seventh, and District of Columbia Circuits have held that review is available even if the defendant has not shown a firm intention to testify, or has not made clear the substance of his testimony.[8] The Third Circuit has explicitly held that review is available, without addressing the question of the defendant's obligation to make a record.[9] The Second Circuit has implicitly held that review is available.[10] And the Eighth

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[7]*United States* v. *Cook*, 608 F.2d at 1186 (opinion of Goodwin, J.), 1188 (opinion of Wallace, J.), 1196-1197 (opinion of Hufstedler, J.); *United States* v. *Portillo*, 633 F.2d 1313, 1321 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); *United States* v. *Hendershot*, 614 F.2d 648, 651-652 (9th Cir. 1980). Cf. *United States* v. *Halbert*, 668 F.2d 489, 491-494 (10th Cir.), cert. denied, 456 U.S. 934 (1982). See also *United States* v. *LeBlanc*, 612 F.2d 1012, 1013-1015 (6th Cir.), cert. denied, 449 U.S. 849 (1980). The Sixth Circuit made its position more explicit in this case.

[8]*United States* v. *Kiendra*, 663 F.2d 349, 352 (1st Cir. 1981); *United States* v. *Whitehead*, 618 F.2d 523, 528 (4th Cir. 1980); *United States* v. *Toney*, 615 F.2d 277, 279 (5th Cir.), cert. denied, 449 U.S. 985 (1980); *United States* v. *Fountain*, 642 F.2d 1083, 1087 & n.3 (7th Cir.), cert. denied, 451 U.S. 993 (1981); *United States* v. *Lipscomb*, 702 F.2d 1049, 1069 (D.C. Cir. 1983) (en banc). Cf. *United States* v. *Hickey*, 596 F.2d 1082, 1087 (1st Cir. 1979).

[9]*United States* v. *Provenzano*, 620 F.2d 985, 1002 n.22 (3d Cir.), cert. denied, 449 U.S. 899 (1980). Cf. *United States* v. *Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979); *United States* v. *Langston*, 576 F.2d 1138, 1139 (5th Cir.), cert. denied, 439 U.S. 932 (1978). The Fifth Circuit has since made its position more explicit in *United States* v. *Toney*, *supra* note 8.

[10]*United States* v. *Hayes*, 553 F.2d 824, 826-828 (2d Cir.), cert. denied, 434 U.S. 867 (1977); *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969). Cf. *United States* v. *Cavender*, 578 F.2d 528 (4th Cir. 1978); *United States* v. *Williams*, 587 F.2d 1, 1-2 (6th Cir. 1978); *United States* v. *Brashier*, 548 F.2d 1315, 1326-1327 (9th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Jackson*, 627 F.2d 1198, 1209-1210 (D.C. Cir. 1980); *United States* v. *Fearwell*, 595 F.2d 771 (D.C. Cir. 1978); *United States* v. *Smith*, 551 F.2d 348 (D.C. Cir. 1976). The Fourth (*Whitehead*), Sixth (this case), Ninth (*Cook*), and District of Columbia Circuits (*Lipscomb*) have since made their positions explicit. See also cases cited in Annot., 54 A.L.R. Fed. 694, 698-700 (1981).

Circuit has even permitted review in a case where the district court refused to rule on the motion in limine and the defendant then declined to testify.[11]

In *New Jersey* v. *Portash*, 440 U.S. 450 (1979), this Court addressed a similar issue. There a defendant in state court had failed to take the stand, and sought to raise on appeal his objection to a ruling that the prosecution could impeach his credibility by use of immunized grand jury testimony. Because the state appellate court found that the objection was preserved, this Court addressed the merits of the defendant's claim. 440 U.S. at 455; *id.* at 462-463 n.2 (Powell, J., concurring) ("the Court • • • does not decide whether it would regard the constitutional issue as having been properly presented if this case had arisen in federal court"). Justice Powell, joined by Justice Rehnquist, noted, however (*id.* at 462):

> The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.

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[11] *United States* v. *Burkhead*, 646 F.2d 1283, 1285-1286 (8th Cir.), cert. denied, 454 U.S. 898 (1981). In *United States* v. *Cobb*, 588 F.2d 607, 613 (1978), cert. denied, 440 U.S. 947 (1979), the Eighth Circuit held that a defendant who took the stand after his motion in limine was denied, and who himself volunteered the information about his prior conviction, thereby waived the issue. See also *United States* v. *Mariani*, 539 F.2d 915, 921 (2d Cir. 1976).

Justice Blackmun, joined by the Chief Justice, would have gone even further, finding "this adjudication of an abstract dispute not only • • • unwise" but also "beyond the [Article III] jurisdiction of the Court" (*id.* at 468) (Blackmun, J., dissenting).

2. As the sheer volume of cases cited above indicates, this issue is one that arises frequently. Indeed, by its very nature it is one that lurks in most prosecutions where the defendant is not a first offender, since the government may—within the constraints imposed by Fed. R. Evid. 609—impeach a testifying defendant by evidence of prior conviction of crime.

The question is also important as well as common. The consequence of the rule adopted by at least five circuits (see page 7 & note 8, *supra*) is that convictions may be overturned where there is no record for deciding whether the district court erred in its preliminary determination of admissibility. See, *e.g.*, Pet. App. 8a; *New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting); *United States* v. *Cook*, *supra* note 5, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part).[12] In this case, for example, evidence that petitioner had been convicted of an earlier drug-related offense would unquestionably be admissible if petitioner took the stand and denied any prior involvement with drugs. See, *e.g.*, *United States* v. *Gaertner*, 705 F.2d 210, 216-217 (7th Cir. 1983); *United States* v. *Mehrmanesh*, 682 F.2d 1303, 1309 (9th Cir. 1982); Tr. 426; Pet. App. 8a. On the other hand, it may be that Fed. R. Evid. 609(a)(1) would not permit cross-examination about petitioner's prior offense if his direct testimony were different.

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[12] Of course the defendant will still have the burden of showing error in the district court's determination—an undertaking that will be made difficult by his failure to make a record at trial.

Moreover, in cases like this where there "is no indication in the record • • • of the substance of [the] defendant['s] testimony had he testified" (Pet. App. 8a), it is difficult to determine whether any error in the ruling on prior crimes was harmless. See *United States* v. *Fearwell*, 595 F.2d 771 (D.C. Cir. 1978); cf. *United States* v. *Smith*, 551 F.2d 348 (D.C. Cir. 1976). It may be, for example, that the substance of the defendant's proposed testimony was so limited, difficult to credit, or repetitive of matters already proven through other witnesses, that his decision not to testify—even if motivated by an erroneous ruling regarding potential impeachment—would have had no real effect on the jury's determination of guilt. In addition, the court of appeals can only speculate whether the evidence of a prior conviction would have been highlighted or isolated on cross-examination, whether a limiting instruction would have minimized the prejudice, and whether the cross-examination as a whole would have been so exhaustive and damaging that any error arising from the Rule 609 ruling would have been harmless.

Indeed, in this case petitioner's "counsel did not [even] state that [petitioner] would take the stand if the motion were granted" (Pet. App. 2a)—and, of course, a defendant could not be held to any such undertaking even if made. To permit reversal of a conviction under those circumstances would simply invite a defendant to make such motions, and thereby "manufactur[e] [evidentiary] challenges when he has no intention of taking the stand and testifying in his own behalf." *New Jersey* v. *Portash*, 440 U.S. at 468 (Blackmun, J., dissenting).

The dynamics of the trial process provide further reasons for holding, as the court of appeals did, that a Rule 609 claim is preserved only if the defendant takes the stand. Just as the lack of a record on appeal frustrates a reviewing court's ability to determine the existence of error, so the

defendant's failure to take the stand deprives the trial court of the opportunity to reconsider the correctness of its preliminary ruling in a concrete factual context—and deprives the prosecutor of the opportunity to decide for tactical reasons to forego the impeachment. The Seventh Circuit has held that review is not available if the district court explicitly reserves the right to change its decision on a motion in limine. See note 6, *supra*. But such a distinction between that case and this is purely formal, since resolution of a motion in limine is necessarily tentative, and will ultimately depend in most instances on the substance of the defendant's testimony. To preclude review only where the trial court makes an explicit reservation would simply lead courts to declare in each case what is already implicit.

In fact, permitting review and reversal in a case such as this could have more undesirable consequences. Because of the tentative nature of rulings in limine, the trial court need not make any decision at all on the question of impeachment by prior convictions until after the defendant has testified.[13] Adoption of that practice, though it would avoid the problem presented here, would leave defendants worse

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[13]See, *e.g.*, Pet. App. 6a; *United States* v. *Hickey*, 596 F.2d at 1087; *United States* v. *Oakes*, 565 F.2d 170 (1st Cir. 1977); *United States* v. *Cook*, 608 F.2d at 1190 (Kennedy, J., dissenting in part and concurring in part). But see *United States* v. *Burkhead*, 646 F.2d at 1285. Fed. R. Crim. P. 12(b) requires pretrial motions concerning only those matters "capable of determination without the trial of the general issue." And Rule 12(e) permits the district court "for good cause" to defer a motion "for determination at the trial of the general issue." See also *New Jersey* v. *Portash*, 440 U.S. 462 n.1 (Powell, J., concurring) ("there is no constitutional requirement that defendants be given such a ruling at a time when only a hypothetical question can be presented").

Though it is not relevant to the issue here, we note that the district court's ability to defer decision on the issue is restricted by Rule 12(e) when the government, rather than the defendant, seeks a pretrial ruling, since the government's "right to appeal [would otherwise be] adversely affected." Fed. R. Crim. P. 12(e).

off than would a ruling that decisions in limine are not reviewable. After all, a defendant who has the benefit of a preview of what the district court is likely to rule—even if the preview is unreviewable—is assuredly better off than one who must decide whether or not to testify simply on the strength of his lawyer's prediction. See *United States* v. *Cook*, 608 F.2d at 1189 (Kennedy, J., dissenting in part and concurring in part).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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